In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-763

JOSEPH LIPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having accepted a bribe as an Internal Revenue Agent, in violation of 18 U.S.C. 201(c). He was sentenced to one year in prison and fined $2,500. The court of appeals affirmed (Pet. App. 3a-22a).

Petitioner contends that the trial judge improperly limited cross-examination of a government witness

by allowing the witness to invoke his Fifth Amendment privilege against self-incrimination during cross-examination; that the admission of testimony about a prior consistent statement by a key witness and the failure to give limiting instructions to the jury constituted plain error; and that a comment of the prosecutor in closing argument on the failure of petitioner to call certain witnesses was improper. These contentions are without substance and are answered in the thorough opinion of the court below on which we rely (see Pet. App. 4a-8a, 14a-19a).[1]

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[1] With respect to petitioner's main assertion that his cross-examination of a government witness was improperly limited, we note that the question asked of the witness to which he invoked the privilege against self-incrimination—whether he had reported in his income tax return the amount of the fee he had received for arranging a bribe—was wholly collateral to the issues in the case and to his direct testimony with respect to the paying of a bribe to petitioner. In these circumstances, the courts have consistently held that it is not necessary to strike the witness's direct testimony because he has invoked the Fifth Amendment. See *Fountain* v. *United States*, 384 F.2d 624, 627-629 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005; *United States* v. *Cardillo*, 316 F.2d 606, 610-611 (C.A. 2), certiorari denied, 375 U.S. 822. Petitioner's claim (Pet. 4, 12) that a witness in a criminal trial is not entitled to invoke the Fifth Amendment under any circumstances is erroneous (see Pet. App. 15a, n. 13). Moreover, the apparent suggestion (see Pet. 12-13) that the witness could not invoke the privilege because he had pleaded guilty to bribery before trial is without merit, since the privilege was invoked in response to a question involving a possible separate offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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